

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DEBORAH A. WIEDIGER,

Plaintiff,
v.

Civil Action No.
5:12-CV-1620 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

FOR PLAINTIFF

OLINSKY LAW GROUP
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JILLIAN C. KARAS, ESQ.
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FOR DEFENDANT

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on November 8, 2013, during a telephone conference at which a court reporter was present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in her appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, dismissing plaintiff's complaint in its entirety.



David E. Peebles
David E. Peebles
U.S. Magistrate Judge

Dated: November 20, 2013
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DEBORAH A. WIEDIGER,

Plaintiff,

vs.

12-CV-1620

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----x

Transcript of *Decision* held on
November 8, 2013, at the James Hanley Federal Building,
100 South Clinton Street, Syracuse, New York, the
HONORABLE DAVID E. PEEBLES, United States
Magistrate Judge, Presiding.

A P P E A R A N C E S

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1 THE COURT: I have before me a plaintiff who
2 was born in November of 1961, which makes her nearly 52 years
3 old. She has a twelfth grade education. She last worked on,
4 according to her, July 1, 1999. That's at page 114 of the
5 Administrative Transcript. Although I note that she
6 reportedly told Dr. Ganesh that she last worked in 1983.
7 That's at page 287 of the transcript. In any event, she has
8 a work history that is sporadic at best.

9 She suffered what have been referred to as
10 strokes, or events we'll call them, on March 16, 2005 and
11 then again on September 8, 2005 and was hospitalized on both
12 occasions. Since that time she has been treated by
13 Dr. Lowenstein, her long-time provider, medical provider, who
14 she has been treating with since 1985, as well as Dr. Jameel
15 Arastu with Slocum-Dickson Medical Group, a neurologist, who
16 she has seen at least from June of 2008 through October of
17 2009.

18 The plaintiff reportedly suffers from
19 hemiplegic migraine headaches. The frequency varies. And as
20 we have been discussing, there are various excerpts of the
21 record that are inconsistent as to the extent of those. The
22 plaintiff allegedly reported to Dr. Arastu that they occur
23 four times a year and last between a half hour and an hour.
24 However, Dr. Lowenstein suggests that they happen twice per
25 month, a much more frequent basis.

1 Dr. Lowenstein, the long-time treating general
2 practitioner, provided two medical source statements. One on
3 June 10, 2009 opining that plaintiff is very limited in most
4 all categories when experiencing hemiplegic migraine
5 headaches. On April 12, 2010 Dr. Lowenstein opined that
6 plaintiff can lift and carry up to 10 pounds occasionally,
7 sit for one hour, stand for 25 minutes and walk for 25
8 minutes at a time; sit for five hours, stand for two hours
9 and walk for one hour in an eight hour day. Dr. Lowenstein
10 also indicates that plaintiff's memory is significantly
11 affected by her stroke. He attributes these limitations to
12 overall weakness and lower back pain.

Significantly, although there does not appear much focus on the back pain, and at least one point on June 16, 2008 plaintiff denied having back pain, that is at 366, there are references on other occasions, including September 4, 2008 at page 363, and January 29, 2010 at page 402, of reports of back pain.

19 Plaintiff was consultatively examined by
20 Dr. Kalyani Ganesh on June 28, 2007. Dr. Ganesh concluded
21 that the claimant appeared to be in no acute distress. Her
22 gait was normal. She can walk on heels and toes without
23 difficulty. See cannot squat. Her stance is normal. She
24 uses no assistive devices, needed no help changing for the
25 exam or getting on and off the exam table, was able to rise

1 from the chair without difficulty. And based on those
2 findings Dr. Ganesh concluded, quote, "At this time, no gross
3 physical limitation noted to sitting, standing, walking, or
4 upper extremities. The claimant observed using the left
5 hand, left arm freely, no difficulties."

6 There is also a report from a non-examining
7 state consultant C. Zelno rendered on July 28, 2007 stating
8 certain limitations. Magnetic Resonance Imaging testing of
9 plaintiff's brain conducted on March 29, 2005, that's at page
10 188, March 9, 2005 at page 207, May 19, 2006, that's at
11 page 205, and July 1, 2008, page 374, as well as a CT Scan of
12 the brain conducted on October 10, 2007 reported at page 345
13 were all normal. Similarly, EEG testing of the plaintiff
14 both awake and asleep on August 4, 2008 was normal and
15 reflected no significant change from earlier testing on
16 September 23, 2005. That's reported at page 372.

17 Plaintiff has sought no mental health
18 treatment. That's at page 57. Procedurally plaintiff
19 applied for SSI benefits on April 23, 2007 alleging an onset
20 date of March 16, 2005. A hearing was conducted on
21 January 20, 2010 before Administrative Law Judge Marie
22 Greener. ALJ Greener issued a decision on April 29, 2010
23 finding that plaintiff was not disabled at the relevant times
24 and denying her application for benefits. The Social
25 Security Administration appeals counsel subsequently denied

1 review of that opinion on August 31, 2012, making the ALJ's
2 decision a final determination of the agency.

3 In her decision ALJ Greener applied the
4 standard and well-known five-step test for determining
5 disability. Concluding at Step One the plaintiff had not
6 engaged in substantial gainful activity in any relevant time.
7 And Step Two, the ALJ concluded that plaintiff suffers from
8 three severe impairments; obesity, residuals from stroke, and
9 left lower extremity weakness. The ALJ ruled out migraine
10 headaches as severe, noting that according to Dr. Lowenstein
11 plaintiff's reports of pain, muscle spasms and pulling
12 sensation on the left side of her face were unusual symptoms
13 to blame on hemiplegic migraines. She cited at page 399 of
14 the Administrative Transcript for that.

15 The ALJ ruled out diabetes, lumbar spine pain
16 and hand pain as not being severe. The ALJ went on to Step
17 Three to conclude the plaintiff's impairments do not meet or
18 medically equal any of the listed presumptively disabling
19 impairments, including those set forth in Sections 10.14 and
20 11.04 of the listings.

21 Turning to a review of plaintiff's residual
22 functional capacity, or RFC, the ALJ surveyed the available
23 evidence and concluded that notwithstanding her conditions,
24 she retains the RFC to lift and/or carry 10 pounds on an
25 occasional basis, lift and/or carry less than 10 pounds on a

1 frequent basis, can stand and/or walk for a total of at least
2 two hours, and can sit for a total of about six hours,
3 essentially compatible with the regulations as they define
4 sedentary work.

5 In making that determination the ALJ rejected
6 plaintiff's claims of disabling symptomatology noting her
7 sporadic work record, sporadic treatment, vague statements
8 concerning her symptoms, minimal positive diagnostic and
9 clinical findings to corroborate her claims concerning the
10 location, duration, frequency and intensity of her pain.

11 The ALJ gave significant weight to the
12 opinions of Dr. Ganesh, some weight to the opinions of the
13 state consultant, which in my view although not entitled to
14 controlling weight can be considered, some weight to
15 Dr. Lowenstein's June 10, 2009 medical source statement, and
16 little weight to Dr. Lowenstein's April 12, 2010 statement
17 based upon the lack of any evidence of any objective clinical
18 showing of a decrease in plaintiff's capabilities between
19 June 2009 and April of 2010.

20 At Step Four the ALJ noted that plaintiff has
21 no past relevant work history. And at Step Five applying SSR
22 96-9p, the ALJ concluded that plaintiff meets all of the
23 requirements of sedentary work and does not have any
24 non-exertional limitations. Rule 201.18 of the grids was
25 therefore applied to support findings of no disability.

1 My function at this juncture is extremely
2 limited. I apply a very deferential standard of review under
3 which I determine two things; one, were the correct and legal
4 standards applied, and two, was the decision supported by
5 substantial evidence. Substantial evidence is defined as
6 such relevant evidence as reasonable minds might accept as
7 adequate to support a conclusion. To be more than
8 substantial, obviously, I must survey the entire record and
9 there must be more than a mere scintilla of evidence
10 scattered throughout that record.

11 Turning first to the Treating Physician Rule,
12 clearly the Commissioner's regulations require the opinions
13 of a treating physician to be given deference, particularly
14 if they're supported by medically acceptable clinical and
15 laboratory diagnostic techniques and it is not consistent
16 with other substantial evidence. If it is rejected, the ALJ
17 is required to go through an analysis and list the factors
18 considered in rejecting that opinion.

19 I find that the partial rejection of
20 Dr. Lowenstein's opinions is well-supported and explained.
21 The opinions, the extremely limiting opinions of the
22 April 2010 medical source statements simply do not draw
23 support from the clinical notes and findings of
24 Dr. Lowenstein and the other physicians. They're not borne
25 out by any empirical testing and are contrary to the

1 conclusions of Dr. Ganesh.

2 I did give pause to the memory loss issue.
3 There is a statement in Dr. Lowenstein's April 2010 medical
4 source statement concerning significant memory loss.
5 Plaintiff did testify to memory loss in her hearing at
6 page 49. Dr. Young references memory loss at page 364. And
7 there is a reference from September 4, 2008 to memory
8 declining at page 362. Memory loss, of course, is a
9 non-exertional limitation. If it exists and if it were to
10 preclude the plaintiff from being able to carry out, on a
11 sustained basis to remember and carry out simple
12 instructions, it could preclude use of the grids to carry the
13 Commissioner's burden at Step Five. I'm convinced, however,
14 I've reviewed the medical evidence carefully, plaintiff has
15 never sought or received any treatment for memory loss other
16 than 2005. Perhaps vocational training could be viewed as
17 that kind of treatment. It is certainly remote in time and
18 predates some of the events and treatment that we're talking
19 about. So, in my view the memory loss is not a sufficient
20 basis to reject the Commissioner's determination as to Step
21 Five.

22 I did review carefully the credibility
23 analysis. Clearly the ALJ engaged in the appropriate
24 two-step analysis but found that the plaintiff's statements
25 concerning the persistence and extent of her symptomatology

1 was not supported by the record considering her daily
2 activities, the nature of her treatment, the relatively
3 modest treatment received.

4 I then reviewed Step Five. And again other
5 than the memory loss, which I've just described, I found no
6 reason to conclude that to resort to the grids under SSR
7 85-15 was inappropriate. The Commissioner did succeed in
8 carrying her burden at Step Five to establish no disability.

9 So, I will grant defendant's motion for
10 judgment on the pleadings and dismiss plaintiff's complaint
11 in this matter.

12 I want to thank you both. You did an
13 excellent, outstanding job arguing this case today. You have
14 obviously a command of the record and the briefing as well
15 was excellent. So I hope you both have a great weekend.

16 MS. KARAS: Thank you, Your Honor.

17 MS. LEDERER: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, and that the foregoing is a true and correct transcript thereof.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Official U.S. Court Reporter